No. 13,746

IN THE

United States Court of Appeals

For the Ninth Circuit

CHOW SING, by his guardian ad litem, Chow Yit Quong,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Appellee.

BRIEF FOR APPELLANT.

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FILED
DEC - 9 1955
PAUL P. O'BRIEN, CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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JURISDICTIONAL STATEMENT.

The plaintiff-appellant filed in the United States District Court for the Northern District of California, Southern Division, a petition seeking a declaratory judgment of United States citizenship. Such action was filed in accordance with the provisions of former Section 503 of the Nationality Act of 1940 (8 U.S.C. 903). Actions filed prior to December 24, 1952 were preserved by the savings clause of the Immigration and Nationality Act of 1952 (Sec. 405(a); 8 U.S.C.A. 1101, note).

The District Court denied plaintiff's petition for a declaratory judgment (T. 24) and the plaintiff ap-

pealed to this Court (T. 25). This Court reversed and remanded the cause to the District Court for further consideration in conformity with the opinion of this Court (T. 189).[1] Upon reconsideration the District Court once again denied plaintiff the relief requested (T. 191-193). The plaintiff, under date of June 1, 1955, filed his appeal from the judgment of the District Court dated April 6, 1955 (T. 194).

Jurisdiction of this Court to review the District Court's decision is conferred by 28 U.S.C.A. 1291 and 1292.

STATUTES INVOLVED.

Section 1993 of the Revised Statutes of the United States, as amended by Section 1 of the Act of May 24, 1934 (48 Stat. 797) reads:

> "Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the right of citizenship shall not descend to any such child unless the citizen father or mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months

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[1] 217 F2d 140, citing *Mar Gong v. Brownell,* 9 Cir., 209 F2d 448; *Lee Wing Hong v. Dulles,* 7 Cir., 214 F2d 753.

after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."[2]

Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903) provides, in so far as pertinent here:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a National of the United States. * * *"[3]

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[2]The requirement that such children must reside in the United States for at least five years immediately previous to attaining the age of 18 years was retrospectively changed by the 1940 Act to provide that such residence must be between the ages of thirteen and twenty-one years (8 U.S.C. 601(g)(h)), and was again retrospectively changed by the 1952 Act to require that the child must come to the United States before attaining the age of twenty-three years and must be continuously physically present in the United States for five years between the ages of fourteen and twenty-eight years (8 U.S.C. 1401(b)(c)).

[3]This statute has been repealed by the Immigration and Nationality Act of 1952 (8 U.S.C. sec. 1101, et seq.) which became effective December 24, 1952, but Section 405(a) of the latter Act continues the former statute in force and effect as to suits which were pending before the new Act became effective (66 Stat. 280).

STATEMENT OF THE CASE.

The appellant claims to be the lawful blood son of Chow Yit Quong. The defendant-appellee admits that the said Chow Yit Quong is and was at the time of the birth of the appellant a United States citizen.

The appellant arrived at the port of San Francisco, State of California, ex the SS "President Wilson" on August 23, 1950, seeking admission to the United States as a citizen thereof. A Board of Special Inquiry denied appellant's application for admission and recognition as a United States citizen. The appellate administrative authorities affirmed the Board's decision and excluded the appellant from the United States. Thereafter, this action was brought in the Court below under the provisions of Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903) for the purpose of establishing the United States nationality of the appellant herein.

This case came to trial without a jury. The appellant, his father, Chow Yit Quong, his brother, Chow Sam, and one disinterested witness, testified concerning the claimed relationship. Under date of January 12, 1953 the lower Court concluded that the "evidence presented by plaintiff does not conform to the standards fixed in Ly Shew v. Acheson, 110 F. Supp. 50, this day decided". On appeal, this Court reversed and remanded directing the District Court to make findings in the light of its decision, *Chow Sing v. Brownell,* 217 F.2d 140.

Pursuant to the mandate of this Court, on March 11, 1955, further proceedings were had in the trial

Court. The proceedings had therein are fully set forth in the instant record (T. 196-236). Following these proceedings the trial Court once again rendered judgment in favor of the defendant-appellee. It is from this last decision that the present appeal follows.

SPECIFICATION OF ERRORS.

1. That the findings of the District Court are clearly erroneous.

2. That the District Court failed to comply with the mandate of this Court.

3. That the findings, conclusions and judgment of the District Court are unsupported by the evidence of record.

4. That the findings, conclusion and judgment of the District Court are contrary to the evidence of record.

5. That the District Court erred in finding that the plaintiff-appellant did not have a claim to permanent residence within the Northern District of California or in the United States of America.

6. That the District Court erred in concluding that the plaintiff-appellant, Chow Sing, is not a United States citizen.

ARGUMENT.

Specification of errors numbered 1, 3, 4, 5 and 6 are similar to those argued on the earlier appeal to

this Court (T. 185). For the sake of brevity reference is made to the briefs presented to this Court upon the occasion of the prior appeal. In connection with this issue, there is only one additional factor which appellant wishes to point out at this time. This issue will be discussed under the heading—"Judgment Contrary to Law and Contrary to the Evidence". Specification of Error No. 2 will be discussed as a separate topic under the heading "The Trial Court Failed to Obey the Mandate of this Court".

JUDGMENT CONTRARY TO LAW AND CONTRARY TO THE EVIDENCE.

The law will not permit a judgment to be governed by mere sentiment, conjecture, sympathy, passion or prejudice. It demands, and a plaintiff has the right to expect, that all of the evidence will be carefully and dispassionately weighed and considered, and that the judgment will, regardless of the consequences, reflect the beliefs of the trier.

This Court has previously stated that in a case of this nature the plaintiff must establish his burden of proof by a preponderance of the evidence.[4] This term "preponderance of the evidence" is not a mere figure of speech. It is proper to find that a party has succeeded in carrying this burden of proof on an issue of fact, if the evidence favoring his side of the question is more convincing than that tending to sup-

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[4]*Mar Gong v. Brownell,* 209 F2d 448; *Brownell v. Lee Mon Hong,* 217 F2d 143; *Ly Shew v. Dulles,* 219 F2d 414.

port the contrary side, and if it causes the trier of the facts to believe on that issue, the probability of truth favors that party.

Upon conclusion of the trial, after submission of the evidence and closing arguments of counsel, which incidentally occurred while all of the foregoing were fresh in the mind of the trial Court, Judge Goodman stated:

> "Now, Mr. Hertogs, my feeling in the matter is, and it is sort of an intuitive feeling—I'm inclined to think that maybe this boy is the son." (T. 177.)

Viewing this remark realistically, there can be but one conclusion, i.e., plaintiff-appellant presented sufficient evidence to establish in the mind of the trial Judge that the claimed relationship actually existed. Applying the applicable principles of the preponderance of evidence rule plaintiff-appellant sustained his burden of proof, and judgment should have been granted accordingly.

THE TRIAL COURT FAILED TO OBEY THE MANDATE OF THIS COURT.

The mandate of this Court (T. 189, 190) directed the trial Court to make findings in the light of the recent opinions of this Court. In those earlier opinions, this Court held that plaintiffs, in declaratory judgment suits such as the instant matter, were only required to prove their cases by the ordinary burden of proof (preponderance of the evidence) resting on plaintiffs in other civil actions.

Pursuant to the mandate, further proceedings were had in the trial Court on March 11, 1955. At that time, the instant matter and *Ly Shew v. Acheson,* supra, were consolidated for the purpose of argument. A complete transcript of those proceedings has been incorporated in the present record (T. 196-236).

It is very apparent, from a reading of that transcript, that the trial Judge still adhered to his original viewpoint enunciated in his earlier opinion, and contrary to the views expressed by this Court. In support of this contention, we cite part of that record, but sincerely request this Court to read the entire proceeding. Starting at page 208 that record shows the following:

> "The Court. That is a problem, of course, I don't think any appellate court fully realizes, the difficulty of relating these cases to the ordinary standard of cases. And because of the difficulty of the Court in evaluating the testimony, that brought about my statement of the rule which I thought should be applied to this type of case."
>
> * * * * * * *
>
> "And since we have in a great number of similar cases of a similar kind found that there has been fraud and chicanery and lying and everything else involved in them, we approach them with caution. It is because of the general circumstances of this and similar cases. It makes it difficult to appraise the testimony.
>
> It's all done in a foreign language. And the difficulties involved in appraising the testimony given through interpreters, where rarely you have

anyone who is able to speak firsthand as to the facts and speak our language."

* * * * * * *

At pages 209 and 210:

"So that is the reason why I came to that conclusion in this case. I just wasn't convinced by the evidence in this case that, in the shape it was in, that the evidence satisfied me that these two youngsters were the children of Ly Shew.

It is true I imposed a different standard of proof. That is, I suggested, declared according to my view, a different standard of proof. But the problem still remains just the same.

If I were to make a finding now that Ly Shew was the father—I say that in all fairness to counsel for the Plaintiff—if I were to make a finding and I would be prepared to say so in a supplemental finding, if I were to make a finding now and find as a finding of fact that Ly Shew was the father of these two children, I would be making the (17) finding not of my own volition but under some command from another judge.

Now, if another judge who has the power to make a decision wants to make a decision to that effect, I have no quarrel with it, because another judge might decide it another way. But I don't see how I could in justice and in good conscience make a finding of fact because some other judge tells me I should make a finding of fact. It has no reason to it at all. There is no reason behind that at all.

If another judge wants to direct that judgment be entered, that's a different matter. It might be well within the power of the Court to do that.

I am merely speaking at random, gentlemen, pointing out that there is a problem of findings in the case, and that is why I thought I ought to have the view of counsel in the matter."

At page 212:

"The Court (interposing): I have just as much difficulty in proceeding upon the theory of making a finding that he is the father as I have that he is not the father. The same difficulty that existed before exists. And I haven't been helped any by the Appellate Court. I mean, it doesn't make much difference about the standard."

At pages 218 and 219:

"The Court. I don't know what you can do about that. One may decide it rightly or wrongly according to a third person's lights, and that still doesn't change the standards that are involved."

* * * * * * *

"I agree with Mr. Collett, this is not an adversary proceeding of any kind. I don't think that was ever considered. The very language of the statute negatives that. It is a suit to declare American citizenship.

It is true it has to have as a basis for it the fact that somebody is denied some right of citizenship. But what the Court is called upon to do is not to declare that "A" gets judgment against "B" for anything at all. By the very terms of the statute this is declaratory of citizenship.

I don't know how anybody can get away from that fact. That is what the statute says. That is the jurisdiction that is conferred, to declare

whether a person is or is not an (27) American citizen."

* * * * * * *

"It still is a proceeding to declare citizenship. Now, it doesn't make any difference what kind of standard you apply. I think the Court has to decide whether the person has presented sufficient evidence to show he is an American citizen. That is all."

It should also be pointed out that during that discussion counsel for defendant-appellee once again requested the trial Court to apply the "clear and convincing" rule of evidence notwithstanding the mandate of this Court. At page 215, Mr. Collett stated:

"So you don't have the matter of preponderance of the evidence involved. You have the question, has the evidence reached the point where the judge is satisfied."

Also compare remarks of counsel at pages 205, 213, 214 and 216.

A review of the proceedings held on March 11, 1955 clearly demonstrates that the trial Court did not make findings in the light of the recent decisions of this Court. The trial Court erroneously required appellant to establish his case under a burden of proof rejected by this Court. By such action, the trial Court failed to obey the mandate of this Court.

CONCLUSION.

At the conclusion of the trial had in this matter (December 9, 1952) the trial Judge expressed his feeling that the appellant, Chow Sing, was the son of Chow Yit Quong, who is a natural born United States citizen who resided in the United States prior to the birth of the appellant. By statutory law, a child born abroad of an American citizen father acquired United States citizenship and nationality at birth. Yet, in the instant case, appellant's claim is rejected. This is contrary to *Kwock Jan Fat v. White,* 253 U.S. 454, 464, where the Supreme Court stated:

> "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from this country."

It is also clear from a reading of the record that the trial Court continued to impose a standard of burden of proof which had, by this Court, been declared inapplicable to the trial of this case. It is respectfully submitted that such action is contrary to the mandate of this Court.

Wherefore, it is requested that the decision of the trial Court be reversed and that judgment be entered in favor of appellant.

Dated, San Francisco, California,
December 2, 1955.

JACKSON & HERTOGS,
By JOSEPH S. HERTOGS,
Attorneys for Appellant.